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NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF STAMFORD,
Petitioner
Cross-Respondent

V.

THEODORE IEVA,
Respondent
Cross-Petitioner

CROSS-PETITION BY THEODORE IEVA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should *City of Newport* v. *Fact Concerts* be applied retroactively to exonerate a municipality from punitive damages awarded by a jury, where the municipality made no objection to the jury charge, requested no contrary instructions, and conceded the availability of punitive damages against it at trial?

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To The Honorable, The Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:

The cross-petitioner, Theodore Ieva, appellee in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on December 30, 1981. That decision affirmed, in part, and reversed, in part, the judgment of the United States District Court for the District of Connecticut entered in the above case on January 28, 1981.

OPINIONS BELOW

The judgment of the United States District Court for the District of Connecticut, upon a jury verdict, was entered without opinion.

The unreported Order of the United States Court of Appeals for the Second Circuit, and the judgment entered thereon, affirming the judgment for compensatory and punitive damages, as against the defendant, Thomas Grabowski, affirming the judgment for compensatory damages and reversing the judgment for punitive damages, as against the defendant, City of Stamford, are set forth at page 1a of the Appendix.

JURISDICTION

The Order and judgment of the United States Court of Appeals for the Second Circuit was entered on December 30, 1981 (1a). The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1)

STATUTORY PROVISION AND RULE OF PROCEDURE INVOLVED

Title 42, §1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 51, Federal Rules of Civil Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The salient facts concerning the underlying incident of police brutality and Theodore Ieva's damages are set forth in the petition for certiorari by the City of Stamford (No. 81-1803) and Mr. Ieva's reply brief. In essence, this is a litigation arising out of the beating of the plaintiff by Stamford, Connecticut police officer Thomas Grabowski on January 7, 1974. After 12 days of trial, the jury found that the City of Stamford was directly responsible for the unconstitutional conduct by Officer Grabowski by reason of improper hiring, supervision, training, or discipline, and assessed damages. The trial court instructed the jury that it could award punitive damages against the City of Stamford under appropriate circumstances. Evidently motivated not only by the gravity of plaintiff's injuries, but by the potentially lethal character of the misconduct authorized, ratified and condoned by the City of Stamford, the jury awarded punitive damages of $100,000.00 in addition to compensatory damages of $115,000.00 against the City in a verdict rendered on January 22, 1981.

On appeal to the Second Circuit, the City of Stamford claimed for the first time that it is immune from an award of punitive damages under 42 U.S.C. §1983. The City's claim was based upon this Court's decision in *City of Newport* v. *Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), which was rendered three months *after* the verdict in the present case. Plaintiff's claim for punitive damages against the City was made in his original complaint filed in October, 1975. The City raised no objection to this claim at any time prior to the trial. At no time during the trial did the City claim any immunity from punitive damages. In the lengthy chambers conference preceding the jury charge on damages, the City made no claim of immunity, even though the Court mentioned that *City of Newport* was then pending before this Court. After the charge was given, counsel for the City objected, but only on the ground that the standards for punitive damages were different from those stated by the trial court.[1]

Thus, the City conceded at trial that it was *not immune* from a punitive damage award. The motion for a new trial filed by the City made no claim to immunity from punitive damages. On appeal, however, the Court of Appeals set aside the punitive damages awarded against the City of Stamford. The Court of Appeals reasoned, "Since this case comes to us on direct appeal, *City of Newport* requires us to set aside the punitive award against the City."

REASONS FOR THE ALLOWANCE OF THE WRIT

Theodore Ieva asks, pursuant to Rule 19.5, Supreme Court Rules, that this Court grant his cross-petition in the event the City of Stamford's petition is also granted. In *City of Newport*, this Court did not authorize the lower courts to disregard the requirement of Rule 51, Federal Rules of Civil Procedure, that

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[1]Counsel for the City stated: "Your charge as to punitive damages as to the City, the city must someway authorize, ratify or foster the actions. My objection is that is not the standard. There is a different standard."

a litigant who fails to make a timely objection to the charge is barred from claiming error in the instructions to the jury. Rather, this Court held that the policies of Rule 51 were adequately served when a litigant raised the objection in a motion for new trial, which squarely presented the issue and which was resolved by the trial court on a complete record. Disregarding the carefully limited exception to Rule 51 authorized in *City of Newport,* however, the Court of Appeals in this case upset a jury verdict despite the complete waiver of any objection by the City of Stamford in the trial court. This result cannot be squared either with Rule 51 or this Court's holding in *City of Newport.*

The holding of the court below is also inconsistent with *Black* v. *Stephens,* 662 F.2d 181 (3d Cir. 1981), *petition for cert. filed, sub nom. Stephens* v. *Black,* 50 U.S.L.W. 3550 (U.S. Jan. 12, 1982) (No. 81-1239), the only reported appellate decision on this issue in the wake of *City of Newport.* In *Black,* the Third Circuit Court of Appeals faithfully construed *City of Newport* so as to bar a municipality's attempt to set aside a punitive damage award retroactively. The policies of fairness to litigants and finality of adjudication militate in favor of the view adopted by the Third Circuit. Further erosion of the mandatory requirements of Rule 51 is unwarranted, and certiorari should be granted by this Court in the interests of procedural fairness and sound appellate jurisprudence.

ARGUMENT

I. Certiorari Should Be Granted To Resolve The Conflict Between The Decision Below And *City Of Newport* v. *Fact Concerts, Inc.*

Under the teaching of the *City of Newport,* the issue of municipal punitive damages liability was not preserved for appeal in the present case. This Court noted in *City of Newport* that the language of Rule 51 is "uncompromising" in its prohibition on appellate review of jury instructions absent a timely objection to the charge at trial. 101 S.Ct. at 2753. Review on the

merits was permitted on *City of Newport only* because the District Court reached the merits of this issue on a motion for a new trial: "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves." *Ibid,* at 2754. Unlike the City of Newport, The City of Stamford's waiver of any claim to punitive damages immunity was complete, and Rule 51 forbids its tardy attempt to assert that immunity in the Court of Appeals.

Rule 51 serves the important functions of orderly judicial administration and fairness to the parties, and it prevents litigants from making a tactical choice to withhold a timely objection at trial in order to preserve a ground for appeal. *City of Newport,* at 2753; 2763 (dissenting opinion). The Rule insures that the trial judge is informed in precise terms of any objections and has an opportunity to correct any errors in the charge. *Marshall* v. *Nugent,* 222 F.2d 604 (1st Cir. 1955). Additionally, the rule protects jury deliberations from the distorting effect of the submission of issues which should have been withdrawn from jury consideration. Accordingly, courts deny appellate review to a litigant who fails to comply with the requirements of Rule 51. *Cohen* v. *Franchard Corp.,* 478 F.2d 115 (2d Cir. 1973); *U.S. for Use and Benefit of D'Agostino Excavators, Inc.* v. *Hayward-Robinson Co.,* 430 F.2d 1077 (2d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971). See also, cases cited in 5A Moore's *Federal Practice,* ¶51.04, at 51-9 et. seq. (1980); Wright and Miller, *Federal Practice and Procedure,* §2553, at 639 (1971).

No policy has been offered to justify avoiding the mandate of Rule 51 in this case. Even the "plain error" doctrine, under which an appellate court may sometimes review a jury charge notwithstanding the absence of a timely challenge to jury instructions, is not applicable here. Such review is available only to correct instructions so contrary to law as to be manifestly unjust. *Morris* v. *Travisono,* 528 F.2d 856, 859 (1st Cir.

1976); 9 Wright and Miller, *Federal Practice and Procedure*, §2558, at 675; *Cohen* v. *Franchard Corp., supra* at 124-25. In *City of Newport*, the Supreme Court majority and dissenting opinions agreed that jury instructions which permitted the award of punitive damages did not constitute one of the "obvious instances of injustice or misapplied law" which would warrant appellate review in the absence of an objection to the charge. 101 S.Ct. at 2754, 2764. That determination is conclusive against any claim in the instant case that this Court should reverse the verdict on the theory of plain error in the punitive damages charge. See also, *Whiting* v. *Jackson State University*, 616 F.2d 116, 126-27 (5th Cir. 1980); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.*, 578 F.2d 691, 695-96 (8th Cir. 1978); *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974); *Bastista* v. *Weir*, 340 F.2d 74, 85 (3d Cir. 1965).

Moreover, sound appellate jurisprudence requires that the *City of Newport* result should not be applied retroactively to the present case, in which all trial court proceedings were concluded prior to the Supreme Court decision. *City of Newport* developed a new interpretation of the civil rights statute, 42 U.S.C. §1983, so as to eliminate municipal liability for punitive damages. Even where a new, controlling interpretation by the Supreme Court is based on constitutional grounds rather than merely statutory construction, retroactive application of the new ruling is generally not appropriate. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *United States ex rel Angelet* v. *Fay*, 333 F.2d 12 (2d Cir. 1964) *aff'd.* 381 U.S. 654 (1965). The state of the law prior to a new judicial declaration "is an operative fact that cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District* v. *Baxter State Bank, supra* at 374. Although this Court has not forbidden retroactive application in all cases, e.g., *United States* v. *Schooner Peggy*, 1 Cranch. 103 (1801), the Court has made clear that a new ruling should be applied only in a manner that will not prejudice those who might have relied on the prior state of the law. *Linkletter* v. *Walker, supra* at 627; *James* v. *United States*, 366 U.S. 213, 221 (1961).